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IN THE

Supreme Court of the United States

October Term 1955

No. 360

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*

On Petition for Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Government's statement of the question presented is misleading in two important respects. First, it describes the shipments in question as "*military shipments*"—a description which answers the question presented as well as states it. Second, it refers to the shipments in question as having been made *during* and in the aftermath of World

War II. In fact, they were made from January 30, 1946, to September 30, 1946.[1]

The question presented,stated objectively in the terms of the findings of fact[2] of the Court of Claims, is:

> Whether shipments—from January 30, 1946, to Stptember 30, 1946—of dried and canned foodstuffs, drygoods, soap and drugs, procured by the War Department for shipment overseas for distribution to and for the use of the civilian populations of countries occupied and/or liberated by United States military forces, constituted "military or naval property of the United States moving for military or naval and not for civil use" under section 321(a) of the Transportation Act of 1940, and were therefore entitled to move at land-grant rates.

STATEMENT

The purpose of the petition for certiorari in this case is to re-open a question—long since settled—as to the interpretation of a statute which has been repealed. The question is the scope of the "except clause" of Section 321(a) of the Transportation Act of 1940 (54 Stat. 898, 954).

In *United States* v. *Powell,* 330 U. S. 238, decided March 3, 1947, this court held that lend-lease shipments of fertilizer to Great Britain were for civil use and not for military use, in the sense of the statute. The following quotations from the opinion of this court are pertinent:

> "Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the

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[1] VE-Day was proclaimed on May 8, 1945, VJ-Day on August 16, 1945. Proclamations Nos. 2651 and 2660, 10 F. R. 5169, 10111.

[2] Findings 2 and 3, page 24 of Appendix to Petition for Certiorari. See also Finding 4c, page 26.

war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions. * * *

"Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. * * *

"In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. * * * It used more conventional language—'military or naval' use as contrasted to 'civil' use. * * *.

"In the second place, the language of Section 321 (a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321 (a) uses 'military or naval' use in contrast to 'civil' use. * * * When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote Section 321 (a). If that is not the distinction, then 'for military or naval and not for civil use' would have to be read 'for military or naval use or for civil use which serves the national defense.' So to construe Section 321 (a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend 'civil' and 'military' when Congress undertook to separate them."
330 U.S. pp. 243-246.

In *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, also decided on March 3, 1947, this court held that "in general the use to which the property is to be put is the

controlling test of its military character" and that the shipments in question in that case were moving for military use in the sense of the statute.

In earlier cases the Court of Claims had decided the same question of the scope of the "except clause" and had held that the shipments in question in those cases were shipments of military property for military use. *Southern Pacific Co.* v. *United States,* 107 C. Cls. 167, 525.

In later cases the Court of Claims followed and applied the decisions of this court in the *Powell* and *Northern Pacific* cases. *Chicago and North Western R. Co.* v. *United States,* 109 C. Cls. 804, and *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254.

In the last cited case, *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254, the Court of Claims held that shipments of material for fertilizer for civilian use in occupied countries, under an Army program for relief in occupied countries, were not shipments for military use in the sense of the statute. In the opinion in that case the court said:

> "Defendant contends that the shipments were for the purpose of furnishing fertilizer to occupied areas, that this was a matter of vital military necessity, and, therefore, that they were for military use. It says that the fertilizer program was intended to prevent starvation, disease, and unrest which might result from famine in occupied areas, which might endanger the occupying forces or interfere with military operations. This, defendant says, brings the shipments in question within the spirit and the letter of section 321 (a), although the food to be produced was for use by the civilian population.
>
> "It is true that the increase of the food supply in occupied areas was aimed at preventing starvation, disease, and unrest in such areas, and that benefits to our armed forces undoubtedly resulted from this program. It does not follow, however, that fertilizer shipped to

occupied areas to increase food production for consumption by the civilian population is a shipment of property for military use within the meaning of section 321 (a)."

* * * *

"This seems to us decisive of the question presented in this case. In both cases the fertilizer was for use by civilians for the production of food. In both cases the incidental result aided the military effort, but since they were primarily for civilian and not for military or naval use, they do not come within the except clause of the Transportation Act."[3]

In the instant case the Government again contends that the shipments here in question were shipments of "military * * * property * * * moving for military * * * and not for civil use" in the sense of the statute, because they were part of an Army program for feeding and furnishing essential supplies to the civilian populations of occupied and liberated countries, all of which aided the Army in its task of occupation and was a matter of military necessity.

On that point, made again in the instant case, the Court of Claims said that aside from minor variations in the facts the case was indistinguishable in principle from *United States* v. *Powell*, 330 U. S. 238, and *Union Pacific R. Co.* v. *United States*, 124 C. Cls. 254, that the record in the *Union Pacific* case showed that the commodities were part of the same Army program in aid of liberated and occupied countries as were the articles in the instant case, and that "just as the fertilizer ingredients, in *Union Pacific* and *Powell, supra*, bestowed only an incidental benefit on the military effort, and were primarily for civilian use, so the articles in the instant case fall into the same category." The Court of Claims concluded:

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[3] The Government accepted the decision and did not apply for certiorari.

"We are of the opinion that *United States* v. *Powell, supra,* and *Union Pacific Railroad Company* v. *United States, supra,* are controlling in this instance and that the goods shipped were for civil rather than military use." (pp. 15-18, Appendix to Petition for Certiorari)

REASONS STATED FOR GRANTING THE WRIT

It is said that the question presented is important because of a large potential liability on the part of the United States, that there are suits pending in the Court of Claims and in the district courts for amounts totalling $250,000, and that there are many claims pending before the General Accounting Office. So far as the carriers are concerned, the latest of the shipments in question would be on September 30, 1946, all land-grant rates having been repealed effective October 1, 1946, and any such claims on account of which suits were not filed prior to October 1, 1952, are barred by the six-years statute of limitations, 28 U. S. Code, sec. 2501.

The only other reason stated for granting the writ is that the Court of Claims decided this case wrongly, as well as the preceding case *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254. The opinion of the Court of Claims speaks for itself. In view of the decisions of this court in *United States* v. *Powell* and *Northern Pacific R. Co.* v. *United States,* 330 U. S. 238, 248, and the subsequent decisions of the Court of Claims in the cases cited above, it can hardly be contended seriously that the law on this subject—the scope of the "except clause" of Section 321(a) of the Transportation Act of 1940—is unsettled or calls for further consideration by this court.

In short, the sole reason for seeking the writ is that in the Government's view the Court of Claims decided this

case wrongly. On the contrary, the respondent submits that the case was rightly decided.

Respectfully submitted,

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September 1955.